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In the Supreme Court of the United States

OCTOBER TERM, 1985

ZBIGNIEW SCHELLER,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., a foreign corporation for profit, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., a Florida corporation for profit, FREDERICK P. HOBIN, M.D., and T.R. BRUCE, JR.,

Respondents.

On Petition for Writ of Certiorari
To the Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

DID THE FLORIDA COURTS DEPRIVE PETITIONER OF HIS DUE PROCESS RIGHTS AND ACCESS TO THE COURTS WHERE THE APPELLATE COURT JUDGE WHO AUTHORED AN OPINION REVERSING A 7.25 MILLION DOLLAR AWARD IN HIS FAVOR AND DIRECTING A VERDICT AGAINST HIM WAS NEGOTIATING WITH AND DISCUSSING FUTURE EMPLOYMENT WITH ONE OF THE ATTORNEYS FOR THE OPPOSITION AND; SUBSEQUENT TO LEAVING THE BENCH, DID IN FACT GO INTO PARTNERSHIP WITH THAT ATTORNEY.

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IN THE SUPREME COURT OF THE UNITED STATES
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ZBIGNIEW SCHELLER,

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AMERICAN MEDICAL INTERNATIONAL, INC., a foreign corporation for profit, PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., a Florida corporation for profit, FEDERICK P. HOBIN, M.D., and T.R. BRUCE, JR.,

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari issue to review the opinions and orders of the Fourth District Court of Appeal of Florida and the Florida Supreme Court. Those decisions deprived Petitioner of his due process rights and access to the courts where the judge who authored the appellate decision reversing a 7.25 million dollar judgment in his favor was negotiationg with and discussing future employment with opposing counsel during the pendancy of the appeal before him, and subsequently left the bench and went into partnership with that counsel. These actions deprived Petitioner of having his case decided by a fair and impartial tribunal. Due process guaranties a tribunal free from partiality in fact or even the appearance of partiality.

RELEVANT OPINIONS AND ORDERS BELOW

1) The 7.25 million dollar Final Judgment in Petitioner's favor dated _____(Appendix A).

2) Fourth District's decision reversing the Final Judgment and ordering entry of Judgment in favor of Respondents (Appendix B).

3) Petitioner's Motion for Rehearing (Appendix C).

4) Petitioner's Motion to Vacate and/or Motion to Transfer and Supporting Affidavit (Appendix D).

5) Supplemental Affidavit in support of Motion to Vacate (Appendix E).

6) Fourth District's Order denying Motion to Vacate and/or Transfer (Appendix F).

7) Florida Supreme Court's Order denying Petitioner's Petition for Review (Appendix H).

JURISDICTION

The decision of Florida's Fourth District Court of Appeal, reversing the Final Judgment of the trial court, was entered on July 13, 1984 (Appendix B) and the court's denial of Petitioner's Motion for Rehearing and Motion to Vacate and/or Transfer was entered January 30, 1985 (Appendix F). Review was thereafter sought in the Florida Supreme Court where Petitioner argued a violation of his constitutional rights (Appendix G), The Florida Supreme Court declined to accept discretionary jurisdiction by

Order of June 6, 1985 (Appendix H). The Florida Supreme Court's rejection, for want of jurisdiction, of Petitioner's attempt to seek review in that court results in the decision of the Fourth District being rendered by the highest court of Florida in which review can be had. This Court's Jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Constitutional provisions involved are:

The Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const., amend. XIV, §1.

Section 9, Article 1 of the Florida Constitution:

> No person shall be deprived of life, liberty or property *without due process* of law....

Section 21, Article 1 of the Florida Constitution:

> The courts shall be open to every person for redress of any injury and justice shall be

administered without sale, denial or delay.

THE CODE OF JUDICIAL CONDUCT

Canon 3-C(1)

> ...a Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE AND FACTS

UNDERLYING FACTS

Dr. Scheller was both a member of the Medical Staff of Palm Beach Gardens Hospital, a private "for-profit" hospital, and under contract with the Hospital as the Medical Director of the Hospital's Pathology Laboratory. The contract was ambiguous in that it not only provided that either party had the right to terminate it upon 90 days notice, but also that the Department of Pathology must be operated in accordance with the Medical Staff Bylaws. Dr. Scheller testified that the intent of this provision was to incorporate the Staff Bylaws into his contract. Article II of the Staff Bylaws provided that any physician holding a contract with the Hospital must be a member of the Active Medical Staff. This provision was adopted when AMI, a conglomerate that owned 60 hospitals throughout the world, first purchased Palm Beach Gardens Hospital.

The Hospital's staff physicians at the time of purchase had been reluctant to continue on the Staff of this for-profit Hospital unless they were allowed to retain control over matters relating to patient care. They did not want decisions within the Hospital dealing with patient

care to be made based upon profit motives. Therefore, it was agreed that the Medical Staff Bylaws would place decisions regarding patient care in the hands of the Medical Staff. One of the provisions that the Medicial Staff insisted upon was that a physician contracting with the Hospital to run a Department of the hospital must be a member of the Active Medical Staff, which allowed the Medical Staff the opportunity to observe the physician's competency for two years. If the Staff members determined a physician was unqualified, they could object to his admission to the Medical Staff and therefore his employment as a contract physician. Thus, this provision prevented the Hospital from contracting with incompetents to run its different Departments, such as Pathology, Radiology, etc., upon which the other physicians relied. The Medical Staff Bylaws also provided that the Staff members could designate someone other than the contract physician to do their pathology and radiology work, if they so desired.

Dr. Scheller had many disputes with the Hospital, its Administrator, and AMI over the way the Patholoigy Laboratory was being run because the Hospital failed to purchase equipment needed by the Lab; employees hired by the Hospital were unlicensed and incompetent, resulting in gross errors being made and inaccurate test results, and delays in getting test results. While the Hospital and AMI were cutting the Laboratory's budget, production within the Laboratory increased four to five times, with billings increasing from $450,000 to 2.5 million dollars.

Because Dr. Scheller was placing concern for patient care over "profit", he became a thorn in the side of the Hospital and AMI. Dr. Scheller's contract as Medical Director of the Pathology Laboratory was terminated and a physician who was not a member of the Active Medical

Staff was hired to replace him.

Dr. Scheller sued the Hospital for breach of contract, and AMI, the Hospital and the Hospital Administrator for tortious interference with the contract, and tortious interference with advantageous business relationship.

Even though Dr. Scheller had been fired as a contract physician, he was still a member of the Medical Staff and as such was entitled to be appointed the pathologist for any of the Staff members if they chose to use him instead of the Hospital's new contract physician. As a Staff member, he was also entitled to full use of the Hospital facilities pursuant to Article IV of the Medical Staff Bylaws.

> Regardless of an exclusive contract for pathology...a physician, with the consent of the medical staff, may designate a different medical expert in those fields; and that person so designated shall be afforded the *full use* of the Hospital facilities to do his routine work as requested, in which even the medical expert that does the work shall submit a medical fee statement to the patient or to the hospital, as the case may be and there will be no double billing.

During the pendency of this lawsuit the Hospital and AMI refused to allow Dr. Scheller to review and interpret test results performed on patients of doctors who had designated him as their pathologist. Dr. Scheller was required to obtain an injunction to prevent the Hospital and AMI from denying him access to the tests results.

The Hospital and AMI subsequently refused to give Dr. Scheller necessary billing information to bill his patients for the work he was performing. The trial court ruled that Dr. Scheller, as a staff physician, was entitled to this information and entered a second injunction to that effect.

This case was tried before a jury over a four week period. The jury resolved all factual issues in Dr. Scheller's favor as follows (see footnote 1 of Appendix B):

...(a) At the time PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., entered into the contract with Fred Hobin, the Medical Staff Bylaws contained this provision: "Any physician holding a contract with the Hospital must be a member of the active Medical Staff?".
YES___X___NO_____
...(b) At the time they executed the contract on May 12, 1975, was it the intent of ZBIGNIEW SCHELLER and PALM BEACH GARDENS COMMUNITY HOSPITAL, INC., to incorporate that provision into their caontract?
YES___X___NO_____

(c) Was it the intent of the Hospital and the Medical Staff at the time the Bylaws were adopted that this provision meant that the Hospital could not contract with a physician until that physician had been a member of the Medical Staff for at least two years and had been elevated to Active Staff membership?
YES___X___NO_____

(d) Was this provision an essential and material term or condition of the contract?
YES___X___NO_____

(e) Did the Hospital violate this provision of the contract by entering into a contract with Fred Hobin who was not a member of the active Medical Staff?
YES___X___NO_____

The jury found against the Hospital for breach of contract, and against AMI and the Hospital Administrator for interference with contract and tortious interference with contract. The jury found that Dr. Scheller's compensatory damages were $1,250,000, and awarded $1,000,000 in punitive damages against the Hospital, $4,000,000 in punitive damages against AMI; and $1,000,000 in punitive damages against the Hospital Administrator.

FACTS RELEVANT TO CONSTITUTIONAL ISSUE PRESENTED

The Defendants appealed to the Fourth District Court of Appeal. Judge Beranek authored a decision which directed a verdict against Dr. Scheller on all counts, with one Judge dissenting. The decision was rendered on the last day of Judge Beranek's tenure in office. While this case was on rehearing, Dr. Scheller filed a Motion to vacate the Court's decision and/or transfer the case to another District Court for resolution because the Fourth District's decision had been authored by Judge Beranek, and it was subsequently discovered that while sitting on this case Judge Beranek had been discussing future employment with Larry Klein,[1] one of the attorneys representing Respondents; and that subsequent to leaving the bench, Beranek had in fact gone into partnership with Larry Klein

[1] After rendition of the Fourth District Court of Appeal's decision, Larry Klein filed a Notice of Withdrawal as Respondents' attorney.

(Appendix D & E). It was also discovered that Judge Beranek had recused himself from sitting on other law firm's cases while discussing future employment with those law firms, but had not recused himself from sitting on this case (Appendix D). The Fourth District denied Petitioner's Motion (Appendix F). Petitioner's Petition for the Florida Supreme Court to grant discretionary review was likewise denied (Appendix G).

REASONS FOR GRANTING THE WRIT

A party is entitled to the cold neutrality of an impartial judge; the law intends that no judge shall preside in a case which he is not wholly free, disinterested, impartial and independent. U.S. v. ORBIZ, 366 F.Supp 628 (D.C. Puerto Rico 1973); U.S. v. BOFFA, 513 F.Supp. 505 (D.C. Del. 1981).

This right to a tribunal free from partiality, bias or prejudice is a constitutional right based on the due process clause. U.S. v. SCIATO, 531 F.2d 842 (C.A. 111 1976); MILLIGAN V. STONE, 424 F. Supp 1088 (D.C. Cal 1976). A trial before an unbiased judge is *essential* to due process. U.S. v. BOFFA, *supra.*

A fair and impartial tribunal requires at least that the judge or tribunal hearing the case be impartial and that every appearance of complete fairness also be present. WALL v. AMERICAN OPTOMETRIC ASS'N, INC., 379 F. Supp 175, aff'd HARDIVICH v. WALL, 95 S.Ct. 166, 419 U.S. 888, 42 L. Ed.2d 134, reh. den. 95 S.Ct. 648, 419 U.S. 1061, 42 L.Ed.2d 659.

The appropriate test in determining whether a judge should disqualify himself is whether a reasonable person

knowing all of the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned. SMITH v. PEPSICO, INC., 434 F. Supp. 524 (D.C. Fla. 1977). This standard is sufficiently broad enough to require recusal both in those circumstances where partiality is in fact present and where only the appearance of partiality is present. U.S. v. BOFFA, *supra.* Judges should clearly disqualify themselves to avoid the appearance, as well as the actual existence, of impartiality on their part. SPERRY RAND CORP. v. PENTRONIX INC., 405 F.Supp 367 (D.C. Pa 1975). The appearance of impartiality is virtually as important as the fact of impartiality. WEBBE v. McGHIE LAND TITLE CO., 549 F.2d 1358 (C.A. Utah 1977).

In the present case, Petitioner cannot be convinced, and will never be convinced, that he received a fair and impartial decision from the Fourth District Court of Appeal in light of the facts of this case. Confidence in our judicial system is the very frame work upon which it is built and must be scrupulously defended:

> ...It is a matter of no concern what judge presides in a particular cause, but is is a matter of grave conceren that justice be administered with dispatch, without fear or favor *or the suspicion of such attributes.* The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumentalities to work out and arrive at the truth of the controversy.
>
> The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the

confidence of litigants in a fair and impartial adjudication of the issues raised. DICKINSON v. PARKS, 140 So. 459 (Fla. 1932).

It is clear that Judge Beranek should not have continued to sit on this case once he began negotiations and discussions with oppposing counsel regarding the possibility of his leaving the bench and going into partnership with him. It is clear that at least an appearance of impropriety existed. This did not become known to Petitioner until Judge Beranek resigned and announced that he would be going into partnership with opposing counsel, Klein. Petitioner immediately filed a Motion to Vacate Judge Beranek's decision and transfer the case to another District court for resolution.[2] Judge Beranek's actions and the actions of the Florida appellate courts in denying Petitioner any relief constituted a denial of his due process rights. Petitioner was not required to prove actual prejudice, YOUNG v. U.S., 346 F.2d 793 (C.A. D.C.1965), only an appearance of impropriety, to be entitled to relief.

CONCLUSION

The Orders and opinions of the courts of the State of Florida clearly deprived the Petitioner of his due process rights by depriving him of an impartial tribunal to hear the

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[2] Judge Letts (of the Fourth Distsrict Court of Appeal) stated in a specially concurring opinion to the Order Denying Petitioner's Motion to Vacate and/or Transfer that this issue was controlled by in RE ESTATE OF CARLTON, 378 So.2d 1212 (Fla. 1979) which he felt held that it was in the personal discretion of an appellate court judge to determine the sufficiency and the propriety of a request to withdraw. In this case, no motion to disqualify Judge Beranek was made because when the facts were discovered, he had already left the bench. Second, can anyone doubt that if the facts had been discovered while Beranek was still on the bench there would be any reasonable basis for refusing to withdraw from this case where Beranek was discussing future employment with one of the attorneys on the case.

appeal of a case where a jury had awarded him 7.25 million dollars. There is no question that Judge Beranek should have recused himself. There is no question that his actions in failing to do so at least created an appearance of partiality and impropriety. The Florida courts have totally ignored their own pronouncements regarding the requisite of an impartial tribunal, in fact and in appearance, to this country's administration of justice:

> Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of courts to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the admimistration of justice. (STATE ex rel MICKLE v. ROWE, 131 So. 331 (Fla. 1930)).

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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By:_____
EDNA L. CARUSO

CERTIFICATE OF SERVICE

I do hereby certify that three copies of the foregoing Petition has been served on all parties by United States Mail, first class, postage prepaid, this 4th day of September, 1985.